Datlamen Road Public Review

Complaint Investigation 040585

FPB/IRC/106

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106-04912/

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The Investigation

In June 2004, Weyerhaeuser Company Limited (the licensee) submitted a forest development plan (FDP) amendment to build a road that included a bridge over Datlamen Creek, a fish stream on Graham Island in the Queen Charlotte Islands. The amendment proposed constructing the road to an adjacent operating area. A local organization requested information for public review and comment on the amendment. That organization, the Haida Gwaii Marine Resource Group (the complainant), subsequently complained to the Forest Practices Board that:

1. the federal Department of Fisheries and Oceans (DFO) had not adequately enforced the law in connection with stream crossings;
2. the licensee had not provided adequate opportunity for public review and comment;
3. goshawk detection by the licensee was ineffective;
4. Ministry of Forests (MOF) approval of the road crossing was unreasonable; and
5. no biological diversity overview had been carried out for the area.

The scope of the Forest Practices Board's authority to investigate is specified by the *Forest Practices Board Regulation*. Section 5 restricts that authority to compliance with the *Forest and Range Practices Act* (FRPA) by licensees and the provincial government and the appropriateness of the provincial government's enforcement of FRPA. That does not include enforcement by the federal government, so DFO enforcement was not examined. Under FRPA there is no requirement for a biological diversity overview, so that issue also was not investigated.

The Queen Charlotte subspecies of the **northern goshawk** is a forest-dwelling hawk that has been designated as a species at risk provincially, requiring special protection during forest management. It is listed nationally as a threatened species.

Therefore, three issues were investigated:

1. whether the licensee provided a reasonable opportunity for the public to review and comment on the FDP amendment;
2. whether the licensee's goshawk detection was effective; and
3. whether MOF approval of the road and crossing was reasonable.

Background

Datlamen Creek is on north central Graham Island, in the Queen Charlotte Islands, and drains into Masset Inlet southwest of Juskatla. Pink and chum salmon spawn in the lower creek. Coho salmon spawn in the upper portions and rear in small side channels throughout the watershed. Although spawning habitat for pink and chum salmon has been

damaged by forest development, much of the fish habitat in the watershed remains in very good condition. One mid-river portion in particular has abundant floodplain tributary channels that, according to a recent watershed assessment, make it the most valuable intact fish habitat on Masset Inlet.

Immediately north of Datlamen Creek is the Awun Creek watershed. It supports coho and chum salmon, and also contains a large lake for rearing sockeye salmon. Sockeye are found in few watersheds on the Queen Charlotte Islands, and are an important food source to the Haida First Nation.

Commercial forest harvesting has been carried out in both the Datlamen and Awun valleys for years, but the watersheds are not connected by road. The Datlamen Valley is accessible to the public through a network of unpaved logging roads, and is about 40 kilometres from Highway 16. The Awun Valley and several other watersheds further north are accessible only by boat or air from Masset Inlet.

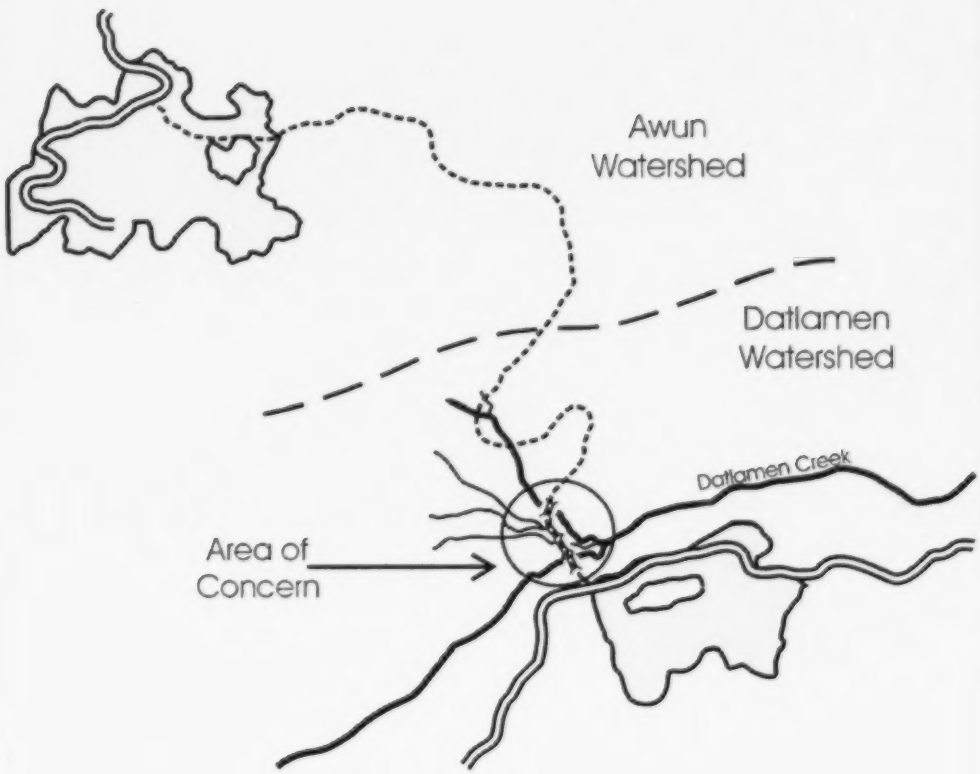
In October 1998, MOF approved MacMillan Bloedel Limited's 1998-2002 FDP. That plan showed a proposed crossing of Datlamen Creek at the upper end of the high value fish habitat area. In March 2000, MOF approved the company's 2000-2004 FDP, which proposed an alternative crossing further upstream, above a salmon barrier. However, neither approved crossing was actually built. This FDP also indicated that the company might wish to construct a road, connecting the Datlamen road network with that in the Awun, at some future date. The licensee did not request approval for the road construction in the FDP.

A **watershed assessment** provides water and fisheries based sensitivity information for use in preparing FDPs. It is a tool to facilitate understanding of the nature and extent of current water-related problems that exist in the watershed. It also helps recognize the possible hydrological implications of proposed forestry-related development or restoration in the watershed.

Weyerhaeuser Company Limited (the licensee) took over the operations of MacMillan Bloedel in 2000. In early 2004, the licensee decided that a connecting road between the Datlamen and Awun watersheds would improve efficiency in two ways. It would make it easier to move the contractor's equipment between the two areas, eliminating the need to schedule barges. In addition, a connection would allow crews working in Awun Creek to return home, rather than stay in remote camps.

The licensee first planned to build the Datlamen crossing in the upstream location beyond the fisheries-sensitive area (as had been proposed in the 2000-2004 FDP). However, that route was too steep for the flatbed trucks that transport large equipment. Therefore, the licensee decided to cross further downstream, across the upper end of the fisheries sensitive area (as had been proposed in the 1998-2002 FDP). Beyond the crossing, the road would go through an established wildlife habitat area (WHA) for northern goshawks. The licensee would have to survey that portion of the route to determine whether goshawks might be nesting in the vicinity before proceeding.

Datlamen Complaint Investigation



Datlamen Connector
Main Roads
S2 Stream
S4 Stream
Bridge
FLA18151
Height of Land
(Map not to scale)

Enlarged
area

The licensee wanted to complete the bridge and road construction to connect the Datlamen and Awun areas by the end of summer 2004. However, the licensee had to amend its 2001-2005 FDP before the connecting road could be approved. The FDP amendment required public review and comment. The licensee anticipated that the normal review and comment period of 60 days would not allow the fish stream (classified as "S2" stream on the location map on page 3) crossing to be completed before the end of a "fisheries window"[1] on August 15. After some discussion, an expedited 14-day review and comment period was accepted by MOF, to run from June 10-24, 2004.

One month later, on July 26, the licensee notified MOF of comments received from the public on the proposed amendment. There was no reference to any concerns from the complainant about the amendment. On July 30, an acting district manager approved the amendment.

With the August 15 deadline fast approaching, the licensee applied for a road permit. That was approved on August 9. The licensee started stream crossing work on August 14, just before spawning salmon were expected. The complainant was observing on site on August 15. As part of its responsibility for fish habitat protection, DFO inspected the site several times in response to requests by both the complainant and the licensee.

Relevant Legislation

In January 2004, the *Forest and Range Practices Act* (FRPA) replaced the Forest Practices Code (the Code) as British Columbia's forest practices legislation. FRPA will be phased in over a transition period ending on December 31, 2006 (with government authorized to extend the period until December 31, 2007). The transitional provisions of FRPA state the Code continues to apply to forest practices carried out under a forest development plan. This continues until there is an approved forest stewardship plan, at which point the requirements of FRPA apply. There was no approved forest stewardship plan in place when the circumstances of this complaint arose, so the Code provisions applied.

a) Public review and comment

The Code sets out requirements for public review and comment. A licensee must:

- make an FDP amendment available for public review and comment
- publish a notice in a local newspaper and provide an opportunity for the interested or affected public to review and comment on the amendment
- upon request, make any completed watershed assessments available at their place of business nearest to the area under the plan, but does not exclude making material available at other locations if that would promote effective review

[1] A fisheries window is a period during which the Ministry of Water Land and Air Protection prefers any disturbance of the stream banks to occur, because salmon are not in the area at that time.

- allow a 60-day public review period, although the district manager can approve a shorter period if that will provide an adequate opportunity for the interested or affected public to review and comment
- consider all comments received and to make any appropriate revisions to the amendment
- submit to MOF copies of any written comments received from the public and a summary of all revisions made to the amendment

b) Goshawk management

WHAs and general wildlife measures (management prescriptions) for WHAs have been established under the Code. Therefore, the WHA for northern goshawks in the Datlamen, and general wildlife measures for goshawk WHAs, imposed requirements for road planning and construction.

c) Management and conservation of forest resources

The Code stated that the district manager had to approve the amendment if satisfied that the amendment had been prepared in accordance with the Code and that it would adequately manage and conserve the forest resources in the area to which it applied. In addition, a person constructing a road crossing of a fish stream had to do so in accordance with any timing windows provided by a designated provincial government environment official.

Discussion

a) Whether the licensee provided a reasonable opportunity for public review and comment

The licensee did not apply to amend the FDP until late May, and was immediately concerned about whether it could complete the instream works necessary to cross Datlamen Creek by mid-August. Timeliness was a concern because under voluntary fisheries window guidelines, construction in streams typically stops in mid-August when salmon spawning is expected to begin. There is some flexibility, because the exact date when the timing window closes is based on site conditions. The licensee was not sure it could get the approvals and complete the work in less than three months.

The licensee acknowledged that it had caused its own timing problem by deciding to proceed on short notice. The fisheries window and the time required to get an amendment approved were both foreseeable. Nevertheless, the licensee, in an e-mail to MOF staff, maintained that it was important to get a quick review done in 2004 because "by next year, there is a good chance circumstances will indicate that the road is not necessary." The licensee said that it could not recall, just three months later, what it had been referring to

that might make the road unnecessary within a year. The licensee could not explain why it was so urgent that the road be constructed in summer 2004.

A public review and comment period was required as part of the amendment preparation process. The standard period specified in the regulations is 60 days. The district manager can reduce the review period, if convinced that a shorter period will provide adequate opportunity for public review. The licensee insisted that the standard review and comment period would not be feasible, if the instream work was to be done during the fisheries window, so the licensee asked the district manager to shorten it. On June 1, the licensee asked for a significant reduction, requesting a review period of only 14 days.

The acting district manager initially refused. The connection would create potentially significant road access for the public through not only to Awun Creek, but on northward through the McClinton Bay, Dinan Bay, and Ian Lake areas. In future, it would be feasible to connect to other roads further north such as those near Eden Lake, potentially making most of north-western Graham Island accessible to the public. There was likely to be significantly increased recreational traffic, resulting in impacts from increased fishing and hunting. There might also be fisheries habitat concerns from the construction over the creek and several tributaries.

On the other hand, the crossing had been previously reviewed by the public as part of previous FDPs. The connecting road had been mentioned in the past, although not formally proposed. In addition, the fisheries window warranted having the instream work completed before August 15, if possible. The acting district manager recommended a 30-day public review period.

The licensee was not satisfied with the recommended period and repeated its request for a 14-day public review. The licensee insisted that the Ministry of Water, Land and Air Protection had "no problem" with the road. It said that DFO was "happy with the crossing." The licensee maintained that public comments had been positive when the Datlamen crossing had been included in previous FDPs. All agencies and the Haida had apparently "continually asked when we're going to hook up." In summary, the licensee maintained that the public was all in favour of the connecting road, making a very short review period adequate.

The acting district manager reconsidered; he would approve a 14-day review period, but subject to a condition. The licensee would have to notify potentially affected parties directly, as well as relying on the standard newspaper advertisement of the public review opportunity. The acting district manager suggested a few organizations and local municipal governments who should be contacted, but it remained the licensee's responsibility to decide who might be potentially affected.

On June 10, 2004, the licensee applied for the FDP amendment and placed a public notice in the local newspaper advising of the 14-day review and comment period. The licensee notified the Haida First Nation through a liaison person and mailed a copy of the amendment to various Haida organizations. The licensee sent an e-mail to four local municipal governments. The licensee also sent the e-mail to a local non-government organization that might have an interest in the amendment, the North Graham Island Streamkeepers. The e-mail explained the proposal and attached the amendment application plus a tourist map of the area. In addition, the licensee notified government resource agencies via the Ministry of Forests.

The North Graham Island Streamkeepers informed the licensee that it could not open the attachments. The licensee did not follow up, because it believed that the group could get the general idea from the text of the e-mail, even without the attachments. On Saturday, June 12, the Streamkeepers asked the Haida Gwaii Marine Resource Group to help them by reviewing the FDP amendment documents. The Haida Gwaii Marine Resource Group, which ultimately became the complainant, e-mailed the licensee on Sunday, June 13, to ask that it be added to the e-mail distribution list.

The complainant attached a copy of the e-mail that had gone to the Streamkeepers. The complainant received no response, so it called the licensee's office to repeat the request. The licensee initially agreed to provide the information but then decided not to do so. The complainant called again. In fact, during the last 10 days of the review period, the complainant telephoned the licensee on 11 occasions. The licensee, however, had decided it did not have to provide the information to the complainant and refused to provide the FDP amendment documents. The licensee had no indication of any response to the complainant—no e-mails, no daybook, no notes to file, no telephone log. The licensee's recollection of events that had transpired three months earlier was very sparse; it recalled only that it had "been busy" at the time.

The complainant had also asked the licensee for a copy of a watershed assessment that the licensee had commissioned for Datlamen Creek in 2003. The licensee refused to provide it. June 24, the end of the review and comment period, passed. The amendment was approved five weeks later, on July 30.

The licensee explained to Board staff why it had refused to provide information for review to the complainant. First, the material was already available for review, both at the licensee's office and at the MOF district office. Second, the licensee distrusted the complainant's motives. In the licensee's view, the complainant had a reputation for continually requesting more information as a delay tactic. The licensee decided not to respond to the complainant's request for documents because there was no legal requirement to do more than make the materials available at its offices and the MOF. Also, the complainant was not one of the listed public groups that had to be contacted as part of the public review and comment process.

Despite past difficulties that the licensee experienced with the complainant, they had a right to review the licensee's FDP amendment. The licensee's newspaper ad stated that the plan would be available during normal working hours at the licensee's place of work and the MOF office, as specified in the Code. Thus, the licensee did provide an opportunity for interested members of the public to review and comment on the amendment proposal. The complainant did not take advantage of the opportunity to review the plans in either location. Had he done so, the licensee would have had no choice but to show him all of the information that he had requested by e-mail, although the licensee was not obliged to provide copies to take away. Thus, the licensee did provide the legally required opportunity for interested members of the public to review the plan.

That said, the public review provisions of the Code provide the only legal avenue for public review of operational plans. It is therefore essential that the opportunity is both adequate and meaningful for all members of the interested public. Input from the public must be respected and responded to appropriately. In this case, it would have been reasonable and prudent for the licensee to make some effort to expedite public review beyond what was legally required, by responding to the complainant's many calls, and by providing the FDP amendment information to the complainant directly. The request, in the Board's view, was not unreasonable. The complainant had a known interest in the land and resources in the area of the plan, and provision of a copy of the material available for review, particularly in electronic form, would have not been onerous.

The district manager's decision to approve such a short period for public review and comment was considered. Given the small size of the community and the past practice of good communication, the directed notification and the newspaper advertisement could have made a 14-day public review and comment period adequate. There was no indication that anyone who had a significant interest in the area did not know of the FDP amendment. The complainant also did not provide any indication that it was unable to go to either the licensee's office or the MOF district office to review the amendment. It was reasonable for the district manager to approve the shortened review period in those circumstances.

The very short public review and comment period was generally adequate in the circumstances, and the licensee complied with Code requirements to make information available. However, the licensee could have done more to make the public review effective and meaningful by at least responding to the complainant's calls and providing an electronic copy of the review materials. The complainant could also have done more by utilizing the opportunity to review the material that was available at the MOF and licensee's offices for that purpose.

b) Whether goshawk detection was effective

The subspecies of northern goshawk on the Queen Charlotte Islands is classified as threatened in Canada and is red-listed (threatened or endangered) in BC. It typically nests

and forages in mature and old forest types. The diversity and abundance of winter prey species such as blue grouse is unusually low on the Islands, possibly due to extensive damage of the understory by introduced black-tailed deer. As a result, goshawk territories are very large (~10,000 hectares) and the birds have a low breeding rate. Therefore, when active nests are found, they receive significant protection from disturbance.

The Datlamen watershed contains 1 of only 10 known goshawk nest sites on Graham Island. It was found in 1996 and a WHA was designated around it. The nest blew down in 1996, but suitable habitat remains. Nevertheless, no new nests have been located in the area since, although goshawks have been observed periodically behaving in a territorial manner. Such behaviour near nest sites is not unusual even when breeding does not occur.

The goshawk WHA includes three 12-hectare core nest areas surrounded by a 200-hectare post-fledging buffer area. The proposed road would not reach a core area but would cross one side of the buffer. Road construction within a goshawk foraging area is allowed, but not during the breeding season of mid-March through August. However, if a nest is inactive, road building can begin as early as July.

A member of the Streamkeepers had reported seeing two probable goshawks near the proposed bridge site at the end of August 2004. The licensee retained a consultant biologist with 15 years of goshawk experience, including 5 years on the Charlottes. Given the plans for road construction, it was important to determine whether goshawks were nesting in the vicinity, so intensive surveying was carried out in 2004.

A goshawk survey crew spent nine days surveying the area in early March and July. One goshawk was observed briefly, but there was no indication of courtship, territoriality, or nesting. Soon after the complainant reported the Streamkeepers' August goshawk observation, the consultant followed up with an interview and another site visit. He concluded that the observations may have been of red-tailed hawks or young goshawks that could, by mid-August, be far from their nesting area. All observations indicated that there was no active goshawk nest in the Datlamen area in 2004.

Goshawk detection procedures were appropriate. There was no substantive evidence that goshawks nested near the road or creek crossings in 2004.

c) Whether MOF approval of the road crossing was adequate to manage and conserve forest resources

The acting district manager could only approve the FDP amendment if it had been prepared in accordance with the Code. The *Forest Road Regulation* required that the bridge crossings of two fish streams (Datlamen Creek and one of its tributaries) would have to be done in accordance with any specified fisheries timing window. However, some years previously, the regional manager of MWLAP had decided the fisheries windows in the region were to be used as guidelines only, not as legal requirements. Therefore, there was

no fisheries window restriction in effect for Code purposes. It should be noted that DFO was also involved in fisheries enforcement in Datlamen Creek, and the licensee was concerned about meeting the August 15 deadline to avoid possible DFO enforcement action.

A second requirement for approval is that the district manager must be satisfied that the amendment would adequately manage and conserve all of the forest resources in the area of the amendment. The district manager is the statutory official to be satisfied, not the Board. Therefore, the Board does not decide whether the district manager made the best decision; a district manager has the authority to choose from a range of suitable options. The Board uses broad tests such as whether decisions are consistent with sound forest practices, whether they achieve the intent of the legislation, and whether they are based on an adequate assessment of available information.

A file note from the MOF tenure officer summarized the considerations relevant to the approval. It noted that the proposed connecting road "has been in the planning stages for a number of years." There were three location options for connecting roads, and the note described the drawbacks associated with each. The proposed connecting road was planned to be used primarily for equipment transport, with little log hauling.

The file note recognized the potential for greatly increased public access to, and north of, Awun Creek, with attendant benefits and concerns. Fish habitat was a resource of obvious concern because the road would cross the upper end of some of the best fish habitat on Masset Inlet. The road had to cross not only Datlamen Creek, but another three tributaries immediately to the north. Initially, a temporary 18-metre portable bridge was to be installed across Datlamen Creek to get equipment across to construct supports for a permanent 35-metre steel bridge. This required a machine crossing of the main creek. In addition, two 5-metre wooden bridges (technically, open-bottomed 'wooden box culverts') were being constructed to span 2 smaller tributaries and a 12-metre steel bridge would cross the third tributary.

In the circumstances, the district manager deferred to DFO staff for fish habitat matters because they had been to the site, were in detailed correspondence with the licensee, and would be monitoring operations. The file note summarized federal scrutiny of the crossing and acknowledged the DFO view that the crossing location, while not ideal, was acceptable.

Ultimately, MOF staff concluded that the issues associated with the proposed location "were manageable, although potentially somewhat problematic." Staff recommended approval, and the acting district manager approved the amendment on July 30.

The potential impact of the increased public access on forest resources over northwestern Graham Island was considered by the district manager, but not actually assessed by the licensee. The local public may well have been in favour of such increased access, but they are not responsible for adequate management and conservation of the forest resources. Access management is a land use decision made in community forums. The issue of access, that could result from the Datlamen connection, was raised at a Queen Charlotte Islands Land Use Plan meeting in September 2004. No specific concerns were raised and no recommendations were made with respect to this crossing. The planners did recommend that an access management plan be developed for the islands to ensure sufficient roadless areas are maintained for black bears. However, access was desired for the hunting and control of deer; an introduced species that has had significant environmental impacts.

Some agencies that are involved in planning land use for this area (Water, Land and Air Protection, MOF, DFO) did review the amendment and supplied comments to MOF. Based on the agency responses, the district manager concluded there were no major problems expected from the increased access.

A district manager, in considering a forestry operational plan approval, cannot fairly be expected to be a surrogate for broad land use planning. It was enough for the district manager to identify the potential impact of increased access, and note that no government agency had expressed significant concern.

The acting district manager considered review comments by government agencies and the public and analyzed the need for the proposed road, and its potential impacts and benefits on wildlife and fisheries resources. It was reasonable for the acting district to be satisfied that approval of the amendment would adequately manage and conserve the forest resources in the area covered by the amendment.

Conclusions

1. The licensee complied with the Code requirement for the public review and comment period. The Board notes that, despite the complainant's many requests, the licensee refused to provide copies of required materials and assessments to allow the complainant to review and comment on the FDP amendment. The Board also notes that the materials requested by the complainant were available at the MOF office. Both the licensee and the complainant could have done more to make the public review effective and meaningful.

2. It was reasonable for the district manager to approve a very short 14-day period for public review and comment because the crossing had been previously reviewed by the public; there were fish habitat protection timing issues; there was generally good communication among the public on the islands; and, the licensee had promised to directly notify potentially affected parties, as well as relying on the newspaper advertisement.

3. Goshawk detection by the licensee was adequate to indicate that goshawks did not have an active nest near the amendment area in 2004.

4. It was reasonable for the acting district manager to be satisfied that approval of the FDP amendment would adequately manage and conserve the forest resources in the area covered by the amendment.